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Minimum resale price maintenance in EU in the aftermath of the US Leegin decision

Elif Cemre Hazıroğlu[1] · Semih Gökatalay[2]

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Abstract *Leegin* decision of the Supreme Court in 2007 affirmed that minimum RPM was to be evaluated under the rule of reason henceforth. Conversely, minimum RPM retains its position as a hard-core restraint in EU's BER 2010 and the *De Minimis* Notice. The limited amount of case law reveal that in the absence of certain factors, such as significant market power of the parties, minimum RPM is unlikely to result in the detriment of consumers. Consequently, despite the retention of the maintenance of the single market as a significant aim in EU competition policy, minimum RPM practices are entitled to a more lenient approach, if the ultimate aim is to attain consumer welfare as stated by the Commission and through most judgments of the Court of Justice of the European Union.

Keywords Antitrust law · US · EU · Art. 101 TFEU · Dr. Miles · Leegin · Minimum resale price maintenance · Hard-core restraints · *Per se* · Rule of reason · Appreciability standard · *De Minimis* notice

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✉ Elif Cemre Hazıroğlu
haziroglu@bilkent.edu.tr

[1] Graduate School of Economics and Social Sciences, Bilkent University, Ankara, Turkey

[2] Department of Economics, Faculty of Economic and Administrative Sciences, Middle East Technical University, Ankara, Turkey

1 Introduction[1]

This paper aims to elaborate on the stance of the European Union (EU) competition policy with regard to minimum resale price maintenance (minimum RPM) practices, after the *Leegin* decision of the US Supreme Court in 2007[2] through which it has abrogated the treatment of minimum RPM under *per se* illegality, and affirmed its analysis under the rule of reason standard henceforth. The decision has triggered much debate both in the US and the EU. It was considered as a radical step in the US for the reason that since *Dr. Miles* decision of the Supreme Court in 1911, minimum RPM practices had been accepted to be *per se* illegal. *Leegin*'s importance for the EU derives from the fact that the EU has been exhibiting US approaches in competition law, thus a change in the US system is likely to indicate a future change in the EU system.

The US competition policy, affected by Chicago School theories, pursues the consumer welfare objective through the application of its rules on competition (Pera and Aurrichio 2005; 156–158). Earlier, the US had been following 'structuralism', according to which agreements threatening the independence of a firm in the market were generally considered harmful to competition, despite the previous inclination of the common law system to protect freedom of contract regardless of its effects on competition (Van Doorn 2009; 54). However, Chicago School has shifted the focus to a practice's effects on prices, quantities and consequently welfare (van Doorn 2009: 44, 54, 55). Hence, the stance of the US regarding vertical restraints has been considerably relaxed over time by the Supreme Court, leaving only minimum RPM outside the scope of application of the rule of reason.[3] This has been an appreciated progress for some, since it demonstrated the modernization of the competition policy, promoting a reliance on economic theory rather than adherence to the formalistic approach of the *per se* rule. Thus, the *Leegin* decision liberating minimum RPM from *per se* illegality was regarded as the last step taken in the right direction (Doty 2008: 13–15; Lugard and van Dijk 2010: 3, 7). For others, however, the decision of the Supreme Court to overrule a nearly century old and strictly followed precedent by not giving plausible reasons other than several theoretical justifications (Briceño Moraia 2010: 14), has not been so exhilarating.

EU competition law is reckoned to have undergone three phases in which the objectives it pursued had changed. The first phase had been consisting of 'the competition objective' and 'single market integration' (van Doorn 2009; 51, 52). During the second phase, the competitive system itself had become the objective. Consequently, the legislation and case law of this phase reflected a hostile stance towards monopolistic power, and protectiveness towards the competitive process through the prohibition of conducts that restrained independent economic behavior

1 The initial version of this paper has been presented by Elif Cemre Haziroglu to Leiden University Faculty of Law (the Netherlands) under the title of "Minimum Resale Price Maintenance Under EU Competition Law in the Light of the Leegin Decision of the US Supreme Court" as a Master Thesis for "European and International Business Law, Advanced LL.M. Programme" in August 2011. An updated and revised version has been orally presented by the same author under the same title in International Law and Economics Conference held in Bilkent (25–26 April 2014).

2 Leegin Creative Leather Products, Inc. *v.* PSKS, Inc., 551 U.S. 877 (2007).

3 For more information regarding the evolution of antitrust policy in the US: See Kovacic and Shapiro (2000).

(van Doorn 2009; 51, 52). As the competition law kept modernizing, the third phase had begun, in which the Commission seemed to focus on the protection of consumer welfare (van Doorn 2009; 51, 52). The Article 81(3) Notice of the Commission[4] prescribes application of Article 81(1) EC as being one that takes consumer welfare into consideration, and thereby connects 'restriction of competition' notion with price and output effects of a particular restraint. Also, both Block Exemption Regulation of 1999[5] (hereinafter, BER 1999) and Block Exemption Regulation of 2010[6] (hereinafter, BER 2010) as well as their accompanying Guidelines[7] recognize market power as a key condition for the test of whether a restraint harms consumer welfare. However, discussions with regard to whether the single market integration has ceased being an objective of the EU still continue.

This article aims to shed light on the reasonings behind the current stances of the US and EU regarding minimum RPM, through a consideration of its most commonly asserted pro and anti-competitive effects, while presenting a compilation of post-*Leegin* judgments of the US states, EU Member States and non-EU states to give the reader a more clear picture of where those currently stand with regard to the treatment of minimum RPM. Ultimately, it will be concluded that contrary to the languages of EU Guidelines and Notices, in fact, protection of the competitive process and the single market has remained to be at the heart of the EU competition policies, rather than an adherence to the practices' effects on consumer welfare. Even though the EU's probable reasons for doing so are comprehended, measures taken for the purposes with respect to the treatment of minimum RPM cases appear to be overreaching, especially considering the disregard of the "appreciability" standard inherent in Art. 101(1),[8] and the practice's exclusion from the *De Minimis* Notice.[9]

[4] Communication from the Commission—Notice—Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97–118. Article 81 EC is the predecessor of Article 101 TFEU, which prohibits agreements "which may affect trade between Member States and which have their object or effect the prevention, restriction, or distortion of competition within the internal market". Nevertheless, such an agreement may still be allowed if it satisfies the conditions of Article 101(3) TFEU [81(3) EC]. Article 101(3) [81(3)] requires that the agreement "contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit", as well as not imposing "restrictions which are not indispensable to the attainment of these objectives" and not affording the parties "the possibility of eliminating competition in respect of a substantial part of the products in question".

[5] Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 336, 29.12.1999, pp. 21–25.

[6] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23.4.2010, pp. 1–7.

[7] Commission Notice—Guidelines on Vertical Restraints, OJ C 291, 13.10.2000 and Commission Notice—Guidelines on Vertical Restraints, OJ C 130, 19.5.2010.

[8] In Case 27/87, SPRL Louis Erauw-Jacquery v La Hesbignonne SC., ECR 1919 (1988). para. 12, it has been established by the Court that a minimum RPM agreement falls under Article 101(1), "only if it appreciably affects trade between Member States".

[9] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), OJ C 368, 22.12.2001. The *De Minimis* Notice, from the scope of which minimum RPM is excluded, exempts vertical agreements from the scope of Article 101 TFEU [81 EC] if the market shares of the parties to the

2 A discussion of anti and pro-competitive effects of minimum RPM

The essence of the discussion with regard to the treatment of minimum RPM in competition laws is largely based on the lack of empirical evidence on minimum RPM cases; consequently, the frequency and significance of its pro and anti-competitive effects being unknown and not enabling an easy prediction. It has been asserted that most of the arguments with respect to pro-competitive effects stem from economic theories (Ghosh 2008: 13, 14); thus, despite being widely recognized as credible theories among economists, scholars and law practitioners, these pro-competitive scenarios fail to come forth as solid evidences that contribute to the vindication of minimum RPM practices. The fact that a larger amount of the limited empirical evidence on minimum RPM cases point at its negative effects causes some to be more prone to believe that there is higher possibility of it being generally anti-competitive. For the purposes of conducting a better analysis of the arguments of both sides, the most commonly asserted pro and anti-competitive effects of minimum RPM will be presented in the following section. Explanations of each alleged effect will be accompanied by the opposing views attached to it.

2.1 Anti-competitive effects of minimum RPM

2.1.1 Price increase

It has been stated by scholars that the immediate effect of minimum RPM is the retail price increase of the manufacturer's products (Paldor 2007: 17; Daujotas 2011: 10; Gippini-Fournier 2009: 3; Grimes 2009: 5; Lao 2008: 254; Briceño Moraia 2010: 2, 3, 6), yet the views as to whether this attests to a decline in consumer welfare vary. Some are of the opinion that increased prices do not necessary lead to the conclusion that consumers are affected negatively, since the enhanced value of the products provided in return may be a voluntary trade-off by the consumers (Directorate for Financial and Enterprise Affairs Competition Committee, Roundtable on Resale Price Maintenance—Note by the United States (Roundtable) 2009: 11, 12; Lugard and Van Dijk 2010: 7; Doty 2008: 5; Reindl 2011: 1319).

The above mentioned assertion is countered by the claim that for higher prices to be a voluntary trade-off, the services and information provided by the retailers should not be of trivial importance to consumers, which could only be the case in complex products, and those not forming the majority of sales in general (Lao 2008: 254, 255). At this point, for products having relatively lower elasticity of demand, such a voluntary trade-off is unlikely to happen, and only for certain luxury goods the aforesaid price increase might positively affect consumer welfare by enhancing consumers' utility that they derive from services.

Footnote 9 continued
agreements are below fifteen percent, with the assumption that they would not have an appreciable effect on the market.

In support of the idea that higher prices do not necessarily diminish consumer welfare, it has been affirmed that the increase could be the result of an outward shift of the demand curve. It has also been claimed that what should be taken into consideration is not whether the minimum RPM applying manufacturer's products' prices had gone up, but rather, whether the minimum RPM scheme had appreciable effects on prices in the relevant product market (Botteman and Kuilwijk 2010: 4). Conversely, some scholars view the situation from the standpoint of infra-marginal consumers, and state that marginal consumers could stop buying the product when the prices increase whereas infra-marginal consumers who value the product higher than the current price would keep buying and be harmed, insofar they bear the costs of additional services they have never desired in the first place (Doty 2008: 5). After all, it is doubtful whether price increase always leads to improvements in services that retailers provide.

2.1.2 Facilitating manufacturer cartel

In the application of a minimum RPM scheme, it is expected that members of a manufacturer cartel would not have the incentive to cut wholesale prices. Since the retailers could not sell the products they had obtained from the price cutting manufacturer to a price lower than the minimum resale price, the demand to that manufacturer's products would not increase. Such a move would not benefit anyone but the retailers, for they would have a greater profit margin (Paldor 2007: 13).

The manufacturer cartels theory has been reprehended by the argument that the available empirical evidence did not support that minimum RPM had been widely used to support cartels. An analysis of all litigated cases in the US regarding minimum RPM between the years 1976 and 1982 has demonstrated that the collusion theory could explain the usage of minimum RPM only in 13.1 % of the sample cases; also, Federal Trade Commission's (FTC) minimum RPM enforcements between 1965 and 1982 have presented that minimum RPM had been applied in highly competitive markets in which widespread collusion was not plausible (Roundtable 2009: 8; Ippolito 1991: 281).

Another argument against minimum RPM being used to support manufacturer cartels is that, in the context of multi-brand retailers, a 'cheat' in the cartel could easily be detected by other manufacturers who are using the same retailer. Also, a cheating that could disrupt coordination would be a relatively widespread one, and might as well be discovered by other price-coordinating mechanisms, since the practice of minimum RPM is costly and unlikely to provide a collusive benefit to the manufacturer (Lambert 2008: 9). It has been further asserted that even if it was to be accepted that minimum RPM led to collusion, non-price vertical restraints were as much capable as minimum RPM to do so when used in parallel by many manufacturers (Botteman and Kuilwijk 2010: 4).

2.1.3 Facilitating a retail level cartel

In case of a price-fixing cartel among retailers, each member of the cartel will have the natural inclination to cut prices, and surpass its rivals by gaining more profit. If these retailers receive their input from the same manufacturer, the manufacturer could easily recognize the cartel member who does not observe the fixed-price, since the latter would be selling more products as a result of his discounted prices, and consequently asking for larger amounts of input. With minimum RPM established, the common supplier will be able to identify and punish the cheating retailer by withholding supplies, and would play the policing role in the retail level cartel (Paldor 2007: 11).

It has been emphasized that for this scenario to come true, the retailers would need to have significant market power so that they could convince the manufacturer to 'impose' a minimum resale price on them to sustain their cartel (Paldor 2007: 12). Absent significant market power, such a practice is not likely to be common, for the manufacturer would not want to eliminate competition among its retailers, which would lead to a decrease in demand for his products. It has also been argued that facilitation of a retailer cartel is not a possibility only for minimum RPM, since collusion on the retailer level could also be realized through market division or consumer allocation (Paldor 2007: 12).[10] Moreover, much less attempting to counter-prove this anti-competitive scenario, the recent literature and empirical evidence appear to point to a completely reverse direction, where minimum RPM is considered to have a deterrent effect on collusion among retailers. As the argument stands, determination of a minimum resale price increases the non-collusive profit of retailers, and thus impairs the feasibility of entering into such anti-competitive behavior. However, if the manufacturer chooses to set a price floor, he might manage to make retail level cartel less profitable (Overvest 2012: 236).

2.1.4 Solution to the commitment problem of the monopolist

If a monopolist manufacturer tries to maximize his profit by selling the right to distribute his products to only one retailer, he would have an incentive to disobey this agreement, and sell to additional retailers for lower prices to increase his market share and monopoly profit. Unless he commits itself to the first agreement by means of an enforcement mechanism, the monopolist cannot extract the full rent of his market power. Through utilizing a minimum RPM scheme, he can commit himself not to follow his natural inclination to lower the wholesale prices he charges to new retailers (Bennett et al. 2011: 1291), since it would not benefit him for the retailers cannot sell at discounted prices. Thus, the monopolist enables himself to earn a monopoly profit rather than a competitive outcome, harming consumer welfare (van Doorn 2009: 8, 9). Nevertheless, it must be underlined that, this line of argument presupposes the application of minimum RPM to all retailers (Motta et al. 2009: 2),

[10] As a counter argument for minimum RPM facilitating cartels both on manufacturer and retail level, Ippolito and Overstreet's Corning Glass Works case study has been pointed out. The study revealed that there was no evidence consistent with the conclusion that its minimum RPM scheme supported collusion at either level, even though Corning Glass was condemned. See, Ippolito and Overstreet (1996), p. 298 *et seq.*

and also non existence of an uncertainty among retailers about each others' contracts (O'Brien and Shaffer 1992: 300).[11]

2.1.5 Foreclosing competing manufacturers

A firm with significant market power may impose minimum RPM to increase the motivation of its retailers to deny access to rival brands (Lambert 2008: 9). If the products of rival brands are for consumers not identical to those of the firm which impose minimum RPM, then unavailability of alternatives will cause consumer welfare losses and even hinder the achievement of Pareto-optimality. Having a smaller set of consumption bundles, households might suffer from failure to reach the combination of products which maximizes their utility, other things being equal. This alleged anti-competitive effect has been countered by the assertion that it requires the manufacturer to have a relatively high market share in order to persuade retailers not to possess other brands' goods, and consequently is not likely to occur very often in all markets (Lambert 2008: 10).

2.1.6 Softening competition among retailers or deterring downstream entry

There is a possibility that retailers ask for a minimum RPM scheme to soften competition among them. When minimum RPM is applied, it will not be possible for the new entrants to lure consumers away from existing retailers by undercutting them. Nonetheless, new entrants can still make more profits through efficiencies, even though they will not be able to use them to take over business through lower prices (Bennett et al. 2011: 1292). Moreover, for the attainment of such minimum RPM scheme, retailers need to have a degree of influence over the upstream firms and strong power in the market against the threat of new entrants. More importantly, the duration of minimum RPM matters in shaping the market structure and restricting competition in both micro- and macro levels (Kretschmer 2014: 349).

2.1.7 Dampening system competition through interlocking minimum RPM agreements

Such an effect could occur if manufacturers use the same retailers, and the application of minimum RPM is widespread in the relevant market. In a market where there is a duopoly of manufacturers and a duopoly of retailers that carry products of both manufacturers, in a bargaining framework, minimum RPM can reduce the retailers' incentives to negotiate on wholesale prices by preventing downstream undercutting (Bennett et al. 2011: 1292, 1293). This would dampen upstream competition as well as risk creating higher retail prices (Bennett et al. 2011: 1292, 1293). The counter-argument with regard to this concern is that the same anti-competitive results could also be achieved by other types of vertical

[11] It has also been claimed that not only minimum RPM but also maximum RPM might cause an increase in prices and total social welfare becomes higher in the absence of minimum or maximum RPM (O'Brien and Shaffer 1992: 307).

restraints. It should be added that the outcome of bargaining might vary according to the type of duopoly (Cournot, Bertrand etc.), the market shares of firms, and bargaining among upstream firms might be even destabilized in the presence of incomplete information. For example, even if transaction cost is equal to zero, bargaining among the agents might not be cooperative (Veljanovski 1982: 60). Furthermore, it is asserted that manufacturers have a tendency to lower production costs in the long-run (Lamoreaux et al. 2002: 430–431). Hence, even if application of minimum RPM would increase retail prices in the short-run, its effects on prices in the long-term relationship might be different.

2.2 Pro-competitive effects of minimum RPM

2.2.1 Increasing inter-brand competition while decreasing intra-brand competition

The establishment of a minimum RPM scheme would result in a decrease in intra-brand competition, caused by the elimination of price competition among retailers of the same manufacturer; however, it is assumed that the retailer would then focus on investing in point-of-sale services to attract more customers to the manufacturer's products, hence creating a more intense competition among rival manufacturers (Reindl 2011: 1315, 1316). The enhanced competition among producers might result in production of high-quality products and might have a positive impact on consumer welfare.

As an opposing view, it has been claimed that a decline in intra-brand competition may result in lack of innovation and efficiency in retailing. According to the argument, minimum RPM would prevent multi-brand retailers from finding cost effective ways of selling competing brands, and thus passing the benefits on to consumers (Grimes 2009: 5; Gippini-Fournier 2009: 8; Daujotas 2011: 9). It has been asserted that in certain instances, a restriction of intra-brand competition can actually diminish inter-brand competition (Lao 2008: 255). In any case, possible effects of minimum RPM on both inter- and intra-brand competitions depend on competitive powers of upstream firms in the market.

2.2.2 Solution to the free-riding problem

Free riding becomes an issue when the product is of a nature that requires retailers to provide pre or post-sales services to consumers and existence of free-riders in downstream markets might cause a Pareto inefficiency. Provision of these services necessitates extra investment on the retailers' part, and consequently causes an increase in the retail price. However, in these instances, it is anticipated that the service provided would increase the consumers' valuation of the product, and that they would be willing to pay more in exchange of the services, increasing the overall demand for the product (Paldor 2007: 17). The retailers would ordinarily be willing to invest in such services, since the envisioned result is an increase their profitability. However, they could lose their incentives to provide services if non-service providing retailers free-ride on their efforts.

The free-riders could avoid bearing the extra costs of provision of services, and use the funds they reserved to cut prices and attract consumers which have already been informed by service-providing retailers (Paldor 2007: 17). Contrarily, if minimum RPM is imposed on retailers, each retailer will be provided a specific margin to invest in service costs. Since the retail price cannot be lowered below the set minimum price, price cutting will not be an option. When retailers are not able to compete on prices against each other, they will focus on competition on service provision. Further, once the prices are uniform, there would be no reason for a consumer to choose to purchase from the non-service providing retailer (Paldor 2007: 18).[12]

The most significant objection presented against the idea of minimum RPM creating a solution to free-riding is, the latter not being a common practice in business world (Lao 2008: 256; Grimes 2009: 3, 4; Gippini-Fournier 2009: 10; Daujotas 2011: 9). Connected to this idea, free-riding only becoming a concern when a product is complex or highly technical, thus absolutely requiring pre-sale or product specific services, also appears to be problematic. Even if it was to be reasoned that the retailers could use the extra margin provided by the minimum RPM to enhance the general features of the shop, that would also fall short of justifying minimum RPM in this respect, since in multi-brand retailers such investments would serve to the subsidization of rival manufacturers' products' sales as well. Consequently, minimum RPM imposing manufacturer faces the risk of losing sales to its competitors, if the latter's products are to be offered for more attractive prices. When single brand shops are taken into consideration, the application of minimum RPM becomes irrelevant, for the retailer would already have sufficient incentive to promote the sales of the only brand in his store (Gippini-Fournier 2009: 10). The theory has also been confronted by the assertion that not all consumers want ambiance in stores, and many consumers seek "low price and low price alone" (Bauer 2007: 15).

Additionally, even if the consumers care about services that retailers provide, distance plays an important role in the choice of consumers. That is to say, even though one consumer wants to benefit from services, if the shop of non-service providing retailer is closer than that of service-providing ones, he might still continue to buy products from the free-riding firm.

2.2.3 *Quality certification and brand reputation*

Retailers select the products they feature on their shelves from a wide variety. If a manufacturer's products are presented on the shelves of a prestigious retailer, it will be a signaling of high-quality. However, the same product can also be sold in outlets that offer lower prices, and consumers would have no reason to buy it from the prestigious outlet, since the certification of quality would be achieved once the consumers see the product in the prestigious retailer's store. Thus, price-cutting outlets would benefit on the quality certification done by prestigious retailers, and

[12] Note that all these discussions are set on assumptions that both the manufacturers and the retailers are profit maximizers while the customers make rational decisions to maximize their utilities.

the latter would not be compensated for their services and be forced out of the market. By introducing a minimum RPM scheme, the manufacturer eliminates price competition among retailers, and guarantees prestigious retailers a sufficient margin in exchange for their services (Paldor 2007: 26).

This potential pro-competitive effect also addresses the free-rider problem on a non-price competition level; thus, it has been subject to same criticisms. An argument specifically intended for this theory is that, status marketing should not be a concern of competition law, and regarded as a pro-competitive effect (Lao 2008: 256). It has also been claimed that, regardless of the retailers' behavior, alternative means to achieve and maintain brand reputation exist, such as consistent quality control by the manufacturer and establishment of the premium image through advertisements (Grimes 2009: 4). The theory has also been criticized on grounds that exceptional promotion and presentation are applied only to a few percent of the overall sales (Daujotas 2011: 9).[13]

2.2.4 Distributional efficiency

Although the emergence of large retailers in the US resolved significant problems related to information and transactions costs, it generated additional ones as the manufacturers had to provide new services (Lamoreaux et al. 2002: 417). A manufacturer can either take on the distribution services himself or consult to a professional distributor for his services. If the manufacturer decides to proceed with the distribution of the products himself, he will have the control on the extent of effort invested in the promotion of his products; however, since he does not specialize in distribution, there is a possibility that he would be less efficient for he may not know how to make the products more attractive to consumers, and maximize the sales (Lambert 2008: 10, 11). Contrarily, if he prefers to request the distribution services, the professional distributor's administration is likely to result in more productive efficiency, however with a shortcoming that the manufacturer could never entirely trust a multi-brand retailer to properly promote his brand (Lambert: 10, 11).

To solve the dilemma between these two alternatives, minimum RPM has been proposed as a middle ground, through which the manufacturer can take advantage of the promotional skills of the distributor, while retaining a degree of control over the distribution services (Lambert 2008: 11). This approach has been countered by the contention that minimum RPM would prevent the efficient, low margin retailers such as drive-in, specialty or department stores from passing their innovations and efficiencies on to consumers, thus impairing consumer welfare (Grimes 2009: 5).

2.2.5 Facilitation of market entry

A new manufacturer's entrance to the market with products that are unknown to consumers could be arduous, for he may have troubles in attracting retailers to

[13] For Mathewson and Winter (1998: 66), in modern markets, this criterion is no longer an issue for the application of minimum RPM, since outlets are well-designed.

promote and sell its untested brand. Due to his new entrance to the market, he would most likely lack the power to require retailer exclusivity. Even if he manages to induce some retailers to carry his products, there remains the possibility of those retailers that make the investments being undercut by other retailers, once the product obtains a reputation in the market. Under these circumstances, assurance of high margins to the retailers willing to introduce the product to the market could be a solution. Facilitation of market entry is particularly important for consumer welfare, since it increases the range of product selection available to consumers (Doty 2008: 4; Lambert 2008: 10).

This pro-competitive scenario for minimum RPM appears to be the one that is regarded as the most persuasive among the skeptics of minimum RPM. Regardless, it has also encountered criticisms. It has been averred that, it is the most natural for manufacturers to compete for retailer attention and shelf space, since retailers purchase the products that seem to attract the most demand from consumers (Gippini-Fournier 2009: 14). In this natural process of competition, the new entrant would not need to induce the retailers to sell its products through wealth transfer, for the competitive products would eventually find their places on shelves if they meet the retailers' criteria (Gippini-Fournier 2009: 14).

2.2.6 Demand uncertainty

Minimum RPM is considered to be welfare enhancing in cases where the retailers have to decide on the quantity of product that they will purchase before consumer demand is known for sure. By establishing a minimum RPM scheme, the manufacturer guarantees that in a low-demand state, the retailer will make enough profits to recover the costs of buying excessive quantities. Consequently, this would induce retailers to buy sufficient amount of inventories to meet the consumer demand in case a high-demand state materializes (Paldor 2007: 33).

This theory has been confronted by the argument that, in such a scenario, the practice of minimum RPM would only broaden the range of non-price competition areas that the retailers would compete in the absence of price competition. It is contended that the retailers would view the excessive inventory as a sunk cost, and would be willing to sell it for any price above zero (Paldor 2007; 33, 34). In a low-demand state, the market price would still be higher than zero, and it would be kept even higher in the presence of minimum RPM. Thus, the margin between the market price and the value of the inventory would be increased (Paldor 2007; 33, 34). Since under competition the retailers use excessive margins to compete against each other, they would be compelled to find other non-price ways of competing. For the scheme would not provide the anticipated benefit of assuring the retailers a supra-competitive margin in a low-demand state, they would eventually refrain from buying the desired quantities before the demand becomes clear (Paldor 2007: 34).

Another argument against is that a less restrictive alternative, such as accepting returns of the unsold merchandise, exists. This alternative could be more logical, since it would be executed if and once the apprehensions about future demands are confirmed by the events, instead of depriving the consumers of the benefits of price competition without knowing whether the fears are substantiated (Gippini-Fournier

2009: 15). It has also been argued that non-price vertical restraints would also be capable of serving to the same aim. Since practices like territorial exclusivity or customer allocation would turn each retailer into a monopoly, each can charge a monopoly mark-up in a low-demand state, and thus compensate the excessive inventory (Paldor 2007: 34). Additionally, as will be mentioned in the discussion part below, in retail markets, there are many factors which determine the demand other than the price (Mathewson and Winter 1998: 67).

2.2.7 Minimum RPM as a contract enforcement mechanism

The establishment of a minimum RPM scheme obliges retailers to perform the activities they implicitly agree to undertake. It would not be economically feasible for the manufacturer to sign an explicit contract with its retailers for the supply of services, since it would be costly to prove the breach and the damages in the court. Hence, the manufacturer requires a private enforcement mechanism such as offering retailers a share of his monopolistic rents. Minimum RPM establishes a future stream of these rents, creating an incentive for the retailers to continue carrying the manufacturer's products. The practice would further be supported by a threat of termination of the retailers' contracts, unless they provide the desired services (Klein and Murphy 1988: 268; Paldor 2007: 27).

The counter argument to employ minimum RPM as a contract enforcement mechanism is related to imperfect information: Each retailer would have the incentive to not to observe the manufacturer's policy, considering he would be more advantageous if the others remain loyal to the agreement while he does not. He could compete with other retailers on non-price grounds, increase the volume of sales and be overcompensated for services, causing the abiding retailers to lose sales. Since the stream of rents guaranteed to retailers is calculated on a per-unit basis, the loss of sales would diminish it, causing the system to lose its effectiveness (Paldor 2007: 32).

2.3 Discussion

It is evident from the explanations in the foregoing paragraphs that minimum RPM can have both pro and anti-competitive effects, and the question of which would prevail depends on the conditions of the market in which it is applied, requiring a closer look at individual cases. Notwithstanding, the benefits of clarity and legal certainty in terms of competition rules are also of an indispensable value for the firms to whom these rules serve as guidance with respect to their behavior in the market. Thus, a balance needs be found between consumer welfare and legal certainty to determine the rightful place of minimum RPM in competition laws. The discussions presented above clearly indicate that minimum RPM is unlikely to cause an appreciable harm to competition, unless the manufacturer and/or the retailer possess a certain degree of market power in the relevant market. Furthermore, for a decrease in intra-brand competition to be detrimental to consumers, there has to be little or no inter-brand competition. The following arguments will be put forward by taking these into account.

The biggest concern for the use of minimum RPM is that it leads to higher prices for the manufacturer's products to which the scheme is applied, and this effect appears to be undisputed. However, another undisputed fact is that, it is not an easy task to determine the effects of this price increase on consumer welfare. To this end, it has been suggested that minimum RPM's effects on output should be taken into consideration instead of on prices when determining firms' liability (Reindl 2011: 1319, 1320).

When minimum RPM is imposed, then price for the product x which is provided by the manufacturer increases ($p_0 < p_1$). If the output increases despite higher prices of the manufacturer's products ($q_0 < q_1$), that would mean that consumers value the enhanced services, and are willing to buy the product for higher prices in exchange of those services. (In this case, $MU_X^i > (p_1 - p_0)$ where MU_X^i is the marginal utility which Consumer i derives from the increase in service quality after the use of minimum RPM). If $TU > n\ (p_1 - p_0)$ where n is the number of consumers in the society and $TU = \sum_{i=1}^{n} MU_i$) represents total utility of these individuals from increase in service quality, then imposing a minimum RPM will not cause a decrease in total consumer welfare.

Given an opposing perspective, if the output remains the same or decreases, that would indicate that the price increase might not be a welcomed effect by the consumers. However, propriety of such an approach could be questioned with respect to the treatment of other vertical restraints, the effects of which are determined from the point of consumer welfare, which takes into consideration at least both price and output effects of a practice. Since $p_0 < p_1$ and $q_0 \geq q_1$ in this case, there are three possible outcomes ($p_0q_0 < p_1q_1$, $p_0q_0 = p_1q_1$ or $p_0q_{0>}p_1q_1$) depending on price elasticity of the demand. If consumers' demand for the manufacturer's good is elastic, then price increase leads to a decline in total revenue as the quantity effect dominates the price effect. As long as $\prod > |\Delta TU|$ where $\prod$ is the total profit made by the firms and ΔTU is the change in total utility of the consumers, then the price increase generated by the use of minimum RPM would not cause a decrease in social welfare even if it might reduce consumer welfare. As such, the ultimate effect of the minimum RPM depends on the ratio of the marginal consumers to infra-marginal consumers.

Minimum RPM would increase the prices of the manufacturer's products; however, if there is sufficient inter-brand competition in the relevant market, the infra-marginal consumers who are expected to be harmed the most from the price increase can turn to substitutable products. If the rival brands manage to satisfy the consumers, then minimum RPM would not pose a risk. On the contrary, the marginal consumers of the manufacturer who appreciate the increased point-of-sale services would be satisfied by the provision of services and buy his products, thus increasing both their and the manufacturer's welfare at the same time. Additionally, the transition of infra-marginal consumers to rival brands would trigger inter-brand competition. Thus, when determining the price and output effects of minimum RPM on consumer welfare, the proxy to be used must not be the price and output of the manufacturer's products who applies the minimum RPM scheme, but rather its effects on consumer welfare with regard to all products (rival manufacturers' included) in the relevant market.

The claim made in the paragraph above is structured on the likeliness of inter-brand competition enhancing effects of minimum RPM to offset the price increase of the manufacturer's products; however, it does not necessarily lead to the conclusion that the Supreme Court's declarations in *Sylvania*[14] and *Leegin* that intra-brand competition is secondary to inter-brand competition is believed to hold true. The competition between the products of different manufacturers offer more choices to consumers, and thus is of great importance; nevertheless, once the aim of the inter-brand competition is fulfilled and the competition between rival brands becomes limited due to the eventual conviction of consumers that certain brands are more worthy of their choices, intra-brand competition comes into play with an ever enhanced importance. Consequently, even if inter-brand competition may come first in the chronological order of events, it does not indicate that it is of a higher importance. Inter and intra-brand competitions are the two faces of a coin that need to exist and work together to fulfill the aims of competition law. Nevertheless, it must still be kept in mind that minimum RPM eliminates only price competition on the retail level; thus, possibility to compete on non-price competition grounds still exists.

It is most likely to be a rare case where market conditions would allow the facilitation of collusion through minimum RPM. In terms of facilitation of a manufacturer cartel, it appears unlikely that a manufacturer would be willing to increase his costs of distribution, unless he expects a degree of increased profit, which could be the result of an output increase. Such a result would bring about the enhancement of consumer welfare if there is sufficient inter-brand competition, and infra-marginal consumers are not harmed. Additionally, monitoring of the upstream cartel is possible by other, cheaper means including being informed by the multi-brand retailer that is used in common with other manufacturers. As for the retail cartel facilitation argument, it is evident that the retailers must have a significant market power to be able to induce the manufacturer to perform such a conduct which would be to his own detriment. Hence, before condemning a manufacturer for such behavior, it would be a proper approach for the enforcement agencies and courts to make sure that the retailers are powerful enough to induce the manufacturer to such a conduct, and also that the practice was actually initiated by the retailers. Furthermore, the collusion-deterrent minimum RPM argument must also not be neglected.

Minimum RPM has been criticized for its capability to foreclose the market, while facilitation of market entry is promoted as a pro-competitive effect. Once again, for a manufacturer to foreclose the market through minimum RPM for its rivals, he has to have a significant market share. Conversely, for the practice to facilitate entry into the market, the usage of minimum RPM by the new entrant would be sufficient. Accordingly, it can be deduced that the possibility of minimum RPM facilitating market entry, and thus presenting a pro-competitive effect in this sense is much higher. As for a foreclosure in the retail market, minimum RPM has been accused of depriving new retailers to attain consumers through lower prices. However, the new entrant can still find other efficient ways of distributing, and

[14] Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

attain consumers by competing with other retailers on a non-price competition level. As regards the foreclosure of competing manufacturers through the practice of minimum RPM, again, the requirement of a significant market power reveals a need for consideration of the specifics of the case at hand, thus preventing its recognition as an impeccable anti-competitive argument. As discussed in Sect. 2, the market share of the firms has been one of the most crucial criteria which affects the Court's decisions.

The solution to free-riding, quality certification, and increasing distributional efficiency arguments as pro-competitive effects of minimum RPM all suffer from the fact that it cannot be guaranteed that retailers would use the extra margin to provide the services desired by the manufacturer. In a vertical relationship, the retailer is an independent agent which selects the products it would offer to the consumers, and retains a certain degree of discretion as to how to present the products that it is selling. He is also free to choose how to manage its finances. In this respect, it seems more likely that, especially for a multi-brand, he would attempt to attract more consumers in the inter-retailer margin by offering attractive services such as free delivery or free wrapping. However, the application of minimum RPM could also solve this problem, since it helps the manufacturer to enforce retailers to provide the desired services that are not explicitly prescribed as an obligation in the contract by intimidating them with a risk of termination of their contracts unless they abide by the manufacturer's rules. This contract enforcing effect has been countered by the assertion that the retailer would be inclined not observe the rules of the manufacturer to the detriment of the abiding retailers, thus leading to an undercut in the value of the stream of rents guaranteed to retailers, which has been the sole reason why they continue carrying the manufacturer's products. However, repudiation by the retailer appears implausible, especially if the RPM scheme is reinforced by a threat of contract termination. Ultimately, the effectiveness of minimum RPM as a contract enforcement mechanism depends on the behaviors of the retailers. It is possible that it can succeed if the retailers do not cheat; consequently, it may result as a rewarding attempt from the perspective of the manufacturer.

Minimum RPM reassuring the retailers to purchase sufficient amount of inventory in anticipation of a high-demand state does not appear to be a credible theory owing to uncertainties which might emerge in the long-run. It is true that there will be a guaranteed profit by the extra margin provided with minimum RPM; nevertheless is cannot be known for sure if that would be sufficient enough to recoup the losses if it turns out to be a low-demand state. In this regard, a promise to the retailer that the unsold merchandise will be accepted by the manufacturer would be a better solution, and it would be more logical as it could be performed *ex post.* Such a practice is also likely to give more assurance to the retailer, since it would guarantee a total recoupment of the losses. Thus, RPM supporters fail to present a firm case from this point of the argument and non-price factors which affect the level of demand should also be taken into consideration. Lastly, minimum RPM having the capacity to be employed as a solution to the commitment problem of the monopolist appears to be credible as well, despite the possibility of the attainment of the same outcome through non-price restraints.

To summarize all these arguments related to the effects of the minimum RPM on consumer welfare, consider a representative demand function for the product X sold by the retailer Y, $X_1^* = X_1$ (p_x, a, b, c, d, e) where p_x is the price of the product X, *a* is the market share of the manufacturer (or, competitiveness in upstream market), *b* is the market share of the retailer (or, competitiveness in downstream market), *c* is the ratio of the marginal consumers to infra-marginal consumers, *d* is the number of outlets around the customer and *e* is service facilities provided by the retailer. In this case, it is very difficult to conclude whether the application of minimum RPM is harmful for consumer welfare or not, as all these parameters dynamically and simultaneously affect the level of demand for product X.

As such, it is very hard to estimate ultimate consequences of all these effects since any kind of vertical integration might have different impact on price mechanisms across various firms and industries (Coase 1937: 389). In addition, any transaction cost generated by entrepreneurial activities depends on business environment (Williamson 1981: 1538). In a Coasean World where market transactions are costless, it is easy to evaluate possible effects of minimum RPM on social welfare for the courts. However, in reality, the situation is quite different due to presence of imperfect information, uncertainty and externalities in the market.[15] If transaction cost is above zero, decision of the courts might make a difference within the framework of economic activity (Coase 1960: 19) and it is nearly impossible to produce a unique solution for all the problems associated with minimum RPM’s effects on consumer welfare. In this regard, the principal goal of the legal system should be minimization of the economic costs for the sake of more efficient outcomes (Veljanovski 1982: 69).

3 Selected case law with regard to minimum resale price maintenance in the aftermath of the Leegin decision

In order to forecast the faith of minimum RPM in the EU, the positions taken by the EU Member States concerning minimum RPM cases are of significance, especially to determine whether they all follow the strict rules of the EU or maneuver within the borders of law to grant the practice a more flexible approach. Moreover, a quick look at the US states’ responses to *Leegin,* and treatment of minimum RPM schemes in countries besides the US and EU Member States would also shed some light to what to anticipate for the future of the RPM worldwide. From this perspective, a selection of US cases regarding minimum RPM has been made, in addition to a compilation of EU Member States case law which more or less deviate from the stringent EU stance. Also, several consequential cases in some non-EU countries have been presented.

[15] According to Mathewson and Winter (1998: 64), if both the upstream and downstream sectors are perfectly competitive, then it becomes impossible to observe existence of minimum RPM schedule. In other words, in the existence of perfect competition, there will be no need for such a contract for the firms.

3.1 Case law in the US

Three states attorneys general have filed a complaint against Herman Miller, Inc. for its RPM scheme, pleading only per se violation despite the action being brought after *Leegin*, alleging violations of Sect. 1 of the Sherman Act and the New York, Illinois and Michigan antitrust statutes. On 21 March 2008, Herman Miller entered into a consent decree with the state attorneys general, which foresees its refrainment from RPM and enforcement of its Suggested Retail Price policy for all of its products. This case has presented that despite *Leegin*, state attorneys general retain their aggressive stance towards RPM schemes, as well as state laws being more stringent than federal laws (Wild 2008).

In April 2000, the Federal Trade Commission (FTC) entered into a settlement agreement with Nine West which admitted to engaging in retail price fixing with some of its retailers in violation of federal and state antitrust laws, and prohibited it from threatening or penalizing retailers that do not abide by its designated resale prices for a duration of 20 years. In October 2007, however, Nine West filed a petition to the FTC, requesting the removal of the prohibition, claiming that it is no longer relevant after the *Leegin* decision of the Supreme Court. Despite the comments received from American Antitrust Institute and a number of state attorneys general advising it on the contrary, FTC granted Nine West its petition on grounds that the application of RPM agreements does not have the potential to harm consumers at that point. The FTC has analyzed pro and anti-competitive effects of the practice, and though it emphasized that the anti-competitive effects cannot be overlooked, it contended that Nine West satisfied the criteria laid down in *Leegin*, especially the criterion of modest market share, and thus removed the prohibition.[16] Nevertheless, FTC required Nine West to provide periodic reports on the effects of the RPM agreements on prices and output, which would allow it to analyze the latter's use of RPM agreements, granting it the capability to challenge Nine West if an illegal conduct is to appear in the future.[17]

On 23 February 2010, the California Attorney General has concluded a consent decree with Dermaquest, banning it from applying its minimum RPM agreements, after filing a complaint against it claiming Dermaquest's minimum RPM agreements constitute a per se offence for violating Californian State Laws, namely, Cartwright Act and the Unfair Competition Law. Another complaint was filed by the Attorney General on 11 January 2011 for the application of minimum RPM schemes against Bioelements, with whom he also entered into a consent decree prohibiting it from engaging in such agreements (Wild 2013).

On May 4, 2012, the Kansas Supreme Court in *O'Brien v. Leegin Creative Leather Products*, declared minimum RPM to be per se illegal under Kansas Antitrust Law, which includes explicit prohibitions on agreements regarding the pricing of goods. However, On 16 April 2013, Kansas legislature has overruled the

[16] As discussed in Sect. 1, market share is a crucial component of the discussions about minimum RPM. However, it is very difficult to determine 'modest' market share for each firm and for each industry.

[17] FTC Modifies Order in Nine West Resale Price Maintenance Case, Press release, May 6, 2008, http://www.ftc.gov/news-events/press-releases/2008/05/ftc-modifies-order-nine-west-resale-price-maintenance-case (last visited: 19.5.2014).

Kansas Supreme Court's decision in O'Brien, subjecting minimum RPM to a rule of reason analysis (Wild 2013).

The New York Attorney General sued Tempur-Pedic International for its "Retail Partner Obligations and Advertising Policies" claiming that they, in essence, constitute minimum RPM, and thus violate state laws. However the lower court rejected the claim, stating that New York State Law does not consider RPM agreements illegal per se. The Appellate Division of the New York Supreme Court, On May 8, 2012, has affirmed the lower court's decision, and in addition to the latter's findings, indicated that the Attorney General could not sufficiently prove that the Policies constituted RPM agreements, and the evidence revealed that the retailers willingly observed the Policies to continue receiving the products (Newburn et al. 2012).

More recently, the United States District Court for the Southern District of New York has decided on 10 July 2013, that Apple's agreements with Hachette Book Group, HarperCollins Publishers, Macmillan Publishers, Penguin Group and Simon & Schuster for the sales of its e-books constituted an infringement of Sect. 1 of Sherman Act. Even though the Court explicitly recognized that vertical restraints are subject to the rule of reason analysis, it has also stated its conviction that "Apple directly participated in a horizontal price-fixing conspiracy". Considering that the agreements could "not [be] properly viewed as either a vertical price restraint or solely through the lens of traditional 'hub and spoke' conspiracies", it ruled that the agreements were per se unlawful.[18]

Finally, for the sake of a full comprehension of the state of legislation in the US, on 14 April 2009, the state of Maryland has amended its antitrust statute, making minimum RPM per se illegal, declaring the practice to be "an unreasonable restraint of trade or commerce" (Kanton 2012).[19]

3.2 Case law in the EU

A major Polish oil refiner and petrol retainer Orlen Oil has applied for an individual exemption for the agreements it had concluded with the distributors of its motor oil product, between 2003 and 2012, which include RPM (in the form of determining a maximum discount percentage), reserving the right to sanction disobedience. The application for exemption had been made only to be rejected. Orlen Oil asserted that the aim of the practice had been to ease the entrance of its new product to the motor oil market, and lower the risk of brand depreciation. It had also argued that the agreements allowed distributors a higher margin, making the resale profitable, as well as asserting other means of attaining its ultimate aim, namely, the introduction of its new product to the market, would have been less effective. The Polish Competition Authority denied exemption to Orlen Oil, stating that the practice

[18] *United States of America v. Apple Inc.,* et al, 12 Civ. 2862 (DLC), p. 153.

[19] As seen from these examples, treatment of minimum RPM cases in different parts of the US has not been the same. The dissimilarity among the states might stem from various market structures. For instance, it is very likely that the market share of upstream firm in one state might be different than that in other state; or, this firm might be a monopoly in one state while it might encounter more competitive business environment in other parts of the US.

prevented the distributors from responding to market dynamics, and that it limited consumer choice due to the product's low substitutability. The Authority has also concluded that Orlen Oil could have utilized other effective methods, such as compensating the distributors for their efforts in promoting the product and certificating its quality. Orlen Oil has been sanctioned a fine and called to discontinue the practice (Stryszowska 2014).

Another case that has come before Polish Competition Authority including minimum RPM agreements (again in the form of determination of a maximum percentage discount, and with the risk of suspension of supplies and withdrawal of previously granted rebates) is the *IMS Sofa* Case, where the Authority had not investigated the actual effects of the practice, being contended with the fact that the agreement had an anti-competitive object, and consequently was capable of restricting competition to the detriment of consumers. The highlights of the decision have been the Authority regarding the distributors as 'passive participants' without any evidence signifying that there was horizontal collusion among them, and thus not directing any allegations against them, as well as it not granting leniency to IMS Sofa despite the latter's application for full immunity, and its conviction that the information and evidence provided by IMS Sofa contributed substantially to its decision. It has been pointed out by commentators that Polish Competition Authority had rarely chosen to sanction only the supplier in previous minimum RPM cases, and it was to be seen whether this policy would be followed in the future cases. It is also being argued whether the current system allowing for leniency application in vertical agreements is appropriate, for anti-competitive practices in the vertical line is easier to detect than horizontal collusions, and parties should not be rewarded for revealing the details of their agreements which could also be easily disclosed by the Competition Authority (Kanton 2012).

Spanish Competition Authority has decided in favor of minimum RPM agreements through utilizing the *de minimis* rule in *El Corral de las Flamencas* case. Article 1 of Spanish Competition Law lays down the prohibition for agreements eliminating competition in the Spanish market by using a language very similar to that of Article 101(1) TFEU. It also enables automatic exemption to those agreements that satisfy the conditions enumerated in Article 101(3), of which the counterpart exists in Spanish Competition Law. Where the Spanish Law differs from EU Competition Law is that, even in the case of hard-core restrictions (such as minimum RPM), the Competition Authority may waive the application of Article 1, if the conduct is not capable of having a significant effect on competition (*de minimis*). Spanish Competition Authority has, for the first time, on 3 December 2009, used this right vested in it in *El Corral de las Flamencas*, and decided that its minimum RPM practice remains outside the scope of the prohibition for it had been convinced that the supplier had very low market share and that the market was atomized without any parallel networks of similar restraints (Pascual and Contreras 2013: 261; García-Gallardo 2014).[20]

[20] As the last two cases suggest, attitude of Member States towards minimum RPM might not be the same. In this case, a company operating in different members of the EU might have different practices within the framework of the minimum RPM. While in some countries such as Spain, market share is an important criterion for application of minimum RPM, in others such as Poland, it becomes insignificant.

Hungarian Competition Authority has also given an unusual judgment with regard to a minimum RPM practice, on 14 May 2008, in *Büki Asvanyviz* case, deciding that the agreements breach neither EU nor Hungarian Competition Law rules. The specifics of the case include, the retailers having to follow different price determinations in consideration of the local markets that they do business in. Consequently, the Authority contended that the aim of the practice had not been to set uniform prices, and thus it did not have the object or could not have the effect of excluding price competition in the market. Even though the Authority underlined that the differentiated resale prices may also cause anti-competitive effects such as driving competitors out of the market, it has stated that at the case at hand, such effects had not been detected (Eklund 2010: 35, 36; Van Bael and Bellis 2008: 14).

3.3 Case law in non-EU countries

In February 2013, Brazilian Competition Authority (CADE) has, for the first time since its establishment in 1990s, investigated a case on minimum RPM, and decided that the practice infringed antitrust law. In principle, Brazilian Law adopts a rule of reason approach to antitrust cases, however, the way CADE addressed the problem appears to be a modified *per se* test rather than a full-blown rule of reason analysis (Martinez and de Araujo 2013: 5). Even though the case has been decided by a majority rule, signifying differences in perspective among its members, the CADE appears to be convinced that RPM practices are highly suspect, and thus should be presumed illegal, putting the burden of proof on defendant if he claims the absence of significant market power or the existence of efficiencies. There has not been any evidence in the case that the retailers had followed the established minimum resale price or that the practice had actually generated negative effects, however, it has been stated that Brazilian Competition Law regards practices unlawful even if they merely pose a risk of production of anti-competitive effects. It has also been pointed out that 20 % market share leads to a presumption of market power, and given the suspicious nature of the practice, it would be appropriate to apply the criterion to the case at hand.[21] Consequently, SKF, which had a market share above this percentage, had been accepted to have a degree of market power in the market. Since, according to CADE, SKF had also failed to demonstrate specific efficiencies, it has been condemned. Being the first ever minimum RPM case that has come before CADE, the *SKF* case is expected to set a precedent for future cases (Zarzur and Spina 2013).

Another landmark case concerning the treatment of minimum RPM cases outside the borders of the EU has been decided in China in August 2013. The *Johnson & Johnson* case is significant not only for being the first case of vertical monopolistic agreement, but also for being the first anti-monopoly case in China where the court

Footnote 20 continued
Accordingly, differences in application of the minimum RPM scheme across countries might have a huge impact on multinational firms' investment decisions, and then on foreign direct investments in these countries. This situation might cause a hindrance for the single market integration purpose of the EU.

[21] Even if countries take the market share of the firms into account, it still poses a great obstacle to determine the maximum level. Namely, while market share less than 20 % does not damage market competition in Brazil, this percentage might be lower or higher for other countries.

of second instance reversed the judgment of the court of first instance, ruling in favor of the plaintiff. The decision of the court of first instance has been in favor of Johnson & Johnson, through its conviction that the plaintiff, Rainbow, failed to prove that the agreement had restrained competition. Shanghai Higher Court, despite reversing its judgment, shares the opinion of the court of first instance with regard to the analytical approach it had adopted, in terms of elimination or restriction of competition being a required element in finding of a monopolistic agreement, and the burden of proof being on the plaintiff to prove the anti-competitive effects of such agreement. The Higher Court underlined that to depart from the general rule of the claimant having to prove his claim, there has to be a particular provision indicating otherwise, which is not the case in Chinese Law concerning vertical monopolistic agreements, unlike the situation in horizontal monopolistic agreements. As the Court continued with the analysis of the case, it has demonstrated the proxies of evaluation of anti-competitive effects of RPM agreements as the determination of whether sufficient amount of competition exists in the relevant market, whether the defendant has a strong market position, the motivation of the defendant in conducting RPM, and finally the consideration of both anti and pro-competitive effects of the conduct on competition. Furthermore, the Court has emphasized that in the existence of anti-competitive effects, it is possible that the market would offset some of these. Consequently, RPM would be regarded as monopolistic, only when it produces anti-competitive effects that are hard to be repaired. Ultimately, despite the concerns of the academia and practitioners regarding the burden of proof being on the plaintiff while RPM being explicitly listed in the Anti-Monopoly Law as a type of vertical monopolistic agreement, and of the National Development and Reform Commission for it has been prone to perform a simple quantitative analysis before deciding that an RPM agreement eliminates competition in the market, the fact remains that the judgment of the Higher Court constitutes a significant guidance for the treatment of future cases on minimum RPM (Dajani and Zhu 2013; Ning et al. 2013).

Finally, it is worth mentioning that the Serbian Competition Law includes a ‘leniency’ provision for agreements restricting competition, including those that involve minimum RPM. The most recent application of leniency to minimum RPM has occurred in cases, of which main actors were a retail chain in Serbia, IDEA, and its suppliers, Grand Prom and Swisslion. Both IDEA and Swisslion (in one of the relevant cases, and only IDEA in the other) had applied for leniency before the Commission prior to a change in the national competition law, for the conditions were more flexible than the approaching new law. However, the Commission has decided to sanction the companies, including the applicants for leniency, in accordance with the new law, for it has contemplated that large retail chains have by default significant market power and IDEA has been the instigator of the practice. Nevertheless, after two annulments by the Serbian Administrative Court, the third decision of the court included modest sanctions and only to Grand Prom, and as for the other case, it has granted leniency to Swisslion under the new Competition Law rules, for it was the first to report the agreement. The importance of the ‘leniency’ practice in Serbian Competition Law derives from the fact that it departs from the EU law in the sense that it enables the firms to apply for leniency in cases of vertical agreements as well as horizontal cartel agreements, thus indicating a more flexible approach to vertical agreements, and to minimum RPM agreements in particular, although only in terms of more modest amount of fines (Karanović and Nikolić 2012: 15).

3.4 Discussion

As it could be deduced from the foregoing paragraphs, despite the existence of several decisions by courts and actions by legislatures relaxing the treatment of the practice, there is an evident and strong resistance towards a more flexible approach to minimum RPM both in the US and in EU. In the non-EU states, the stances also vary, however, it could be noticed that when an effect analysis is performed, it is invariably the *Leegin* criteria that have been utilized. The Chinese *Johnson & Johnson* case could especially be considered as groundbreaking, for its valiant conduct of performing an effect analysis in its first vertical monopolistic agreement case.

The reasons of resistance to a more flexible approach towards minimum RPM differ in the US and the EU. The US, as a matter of fact, the states are hesitant because of the unease caused by the collapse of a century long tradition and because of the Fair Trade era experience which had presented negative outcomes with regard to consumer welfare. It is true that, if the US state courts are to follow the Supreme Court's decision, both they and the Supreme Court itself would face difficulties in assessing minimum RPM cases through the rule of reason due to their lack of experience, caused by minimum RPM's per se treatment for almost a century. However, since other vertical restraints have been treated by the rule of reason, and for that purpose, the necessary assessments like determination of the market and the firms' market power have been performed by the courts; the deficiencies caused by the inexperience would soon diminish. Besides, after undertaking several minimum RPM cases, the courts will start to have a better knowledge as regards to the pro and anti-competitive effects of minimum RPM, and with more empirical evidence at hand, they will soon recognize a pattern that would help them solve such cases with more ease. Since the limited empirical evidence on the effects of minimum RPM had been a result of the cases concluded between the years 1937 and 1975 -in the so-called Fair Trade era, when the Miller-Tydings Act had been in force until it was repealed by the CGPA- the deduction that minimum RPM schemes have more anti-competitive effects than pro-competitive effects appear unjust. The conjuncture of that era had been different, and practices that restricted competition have been encouraged, in some cases even without the consideration of their possible pro-competitive effects, for there had been an urgent need to stir the economy.[22] Thus, the long term consequences of the practices had been disregarded for the sake of foreseeable short-term gains. Consequently, the evaluation of minimum RPM cases through a full-blown rule of reason standard would finally reveal the real effects of the practice, and lead to more substantiated conclusions.

[22] For more information about the characteristics of minimum RPM applications during the Fair Trade era: See, Meese (2013).

Conversely, the EU appears to be more concerned about the maintenance of the internal market, and is doubtful of what a more flexible approach to minimum RPM would bring about for the competition process itself. The languages of the TEU and TFEU clearly reveal that the aim of 'single market integration' still holds an important value in the EU.[23] The General Court's advocacy of the Commission having to prove that an agreement restricted competition "to the detriment of the final consumer" *in GlaxoSmithKline*[24] could have been comprehended as an act of the Court establishing the competition policy of EU as consumer welfare, however, some scholars contend that this should be regarded as an exception (Whish 2009: 51, 52). Moreover, The *T-Mobile* case of 2008 has also created some uncertainties with regard to the main objective pursued by the EU in competition law through the following statement: "Article [101(1) TFEU], like other competition rules of the Treaty, is designed to protect *not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such*".[25] Even though, the emphasis of the EU on single market integration has been duly substantiated through the assertion that it had shaped institutional structures and competences within the system, supplied much of its legitimacy and generated the conceptual framework for the development and application of its substantive norms (Gerber 1998: 347 cited by Bennett et al. 2011: 15) the precautions taken for its preservation in the competition law area appear to be overreaching.

A suggestion for the proper application of Article 101 to minimum RPM includes an inquiry for its potential harmful effects in individual cases under Article 101(1), before automatically accepting its transgression, and immediately proceeding to an Article 101(3) analysis, since such conduct omits the requirement for the Commission to establish the existence of any 'appreciable effects' of the practice on competition in the relevant market, despite the 'appreciability' standard being inherent in the application of Article 101(1) to vertical restraints.[26] Consequently, this negligence leads to an increased burden on the parties to justify a practice that has not yet been evidenced to have anti-competitive effects.

The most likely possibility for the near future could have been the removal of minimum RPM from the hard-core list of *De Minimis* Notice of the Commission, for Commission notices do not have any binding force on Member States, and only serve

[23] To present some examples; Article 3 TEU which lays down the objectives of the EU recites in its second and third paragraphs that the EU "shall offer its citizens an area of freedom, security and justice without internal frontiers" and "establish an internal market." Article 3(1)(b) TFEU confers exclusive competence to the EU in "the establishing of the competition rules necessary for the functioning of the internal market". Article 26(1) TFEU, titled "Internal Market", states that the EU "shall adopt measures with the aim of establishing or ensuring the functioning of the internal market". Article 101(1) prohibits the agreements that are "incompatible with the internal market", while Article 102(1) prohibits the abuse of dominant position "within the internal market or in a substantial part of it".

[24] Case T-168/01, GlaxoSmithKline Services Unlimited *v*. Commission, ECR II-2969 (2006).

[25] Case C-8/08, T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV *v*.Raad van bestuur van de Nederlandse Mededingingsautoriteit, Opinion, para. 58. (Emphasis added).

[26] Case 27/87, SPRL Louis Erauw-Jacquery v La Hesbignonne SC., ECR 1919 (1988) para. 12: the Court underlined that a minimum RPM agreement falls under Article 101(1), "only if it appreciably affects trade between Member States". See also, Gippini-Fournier (2009).

as a recommendation for Member State competition authorities. Moreover, it would not have been a drastic change in attitude, since the Notice only does away with the requirement of competition authorities to analyze the minimum RPM agreements between firms whose aggregate market share does not exceed 15 % of the relevant market, thus not ‘appreciably’ restricting competition. Also, it has been purported above that the Spanish Competition Authority has, in 2009, already utilized the *de minimis* doctrine in *El Corral de las Flamencas* case, leaving the RPM practice outside the scope of antitrust prohibition due to the supplier’s insignificant market share. A genuine relaxation of the EU stance would have highly contributed to the Member State approaches towards minimum RPM and would constitute fairer treatment of the practice, leaving those that would not harm the consumers and would enhance consumer welfare outside the scope of the prohibition. Yet, even the anticipation of removal of minimum RPM from the hard-core list of *De Minimis* Notice has also become a remote possibility, for the EU appears to have chosen to proceed in the opposite direction with the Court of Justice of European Union’s *Expedia* decision, dated 13 December 2012.[27] *Expedia* could have been an independent occurrence, not having any implications for future cases; however, the Commission has issued a press release on 11 July 2013[28] through which it consults Member States about the revision of *De Minimis* Notice, which essentially aims to bring it in line with the approach adopted by the Court in *Expedia* with respect to agreements restricting competition by object, thus rendering the latter always causing an appreciable restriction of competition. Consequently, on the contrary of the expectations, the EU will make its stance towards minimum RPM more stringent, much less taking actions to align its position with the US in the foreseeable future.

4 Conclusion

Leegin decision of the US Supreme Court, foreseeing a rule of reason analysis for minimum RPM cases, has raised questions regarding response of the EU, for the US has been the forerunner of EU competition law rules. However, the reactions of the US States, the EU and EU Member states have not been so welcoming.

[27] Case C-226/11, Expedia/SNCF, 13 December 2012 (not yet reported); In *Expedia*, the Court held that an agreement that may affect trade between Member States and which has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition. The Court’s language suggests that, with respect to agreements restricting competition by object, it will no longer employ the ‘appreciability’ proxy, which softens its stance towards the prohibition of agreements “which have as their object or effect the prevention, restriction or distortion of competition within the internal market” in the application of Article 101(1) TFEU. Thus, let alone removing minimum RPM agreements from the list of hard-core restrictions in the *De Minimis* Notice, which, incidentally, form only a sub-category of the agreements that are regarded as restricting competition by their object (among other specific instances of restriction by object that are enumerated *numerus clausus* as hard-core restrictions in *De Minimis*), the Court intends to expand the scope of hard-core restrictions in *De Minimis* to all restrictions by object as a category.

[28] Draft *De Minimis* Notice 2013. Available at: http://ec.europa.eu/competition/consultations/2013_de_minimis_notice/de_minimis_notice_en.pdf (last visited: 13.4.2014).

Minimum RPM can have both pro and anti-competitive effects, and the question of which would prevail depends on the conditions of the market in which it is applied, requiring a closer look at individual cases. The discussions presented above clearly indicate that minimum RPM is unlikely to cause an appreciable harm to competition, unless the manufacturer and/or the retailer possess certain degree of market power in the relevant market. Furthermore, for a decrease in intra-brand competition to be detrimental to consumers, there has to be little or no inter-brand competition. Notwithstanding the theoretical arguments, it is evident that more case by case analysis of minimum RPM is necessary in order to have more empirical evidence, and it would be constructive for this purpose if the US states grant more credit to *Leegin* and relax their attitude towards minimum RPM cases, realizing that the outcomes of the Fair Trade era had been due to special circumstances. Following such a trend would enable the utilization of RPM schemes that would enhance consumer welfare, hence contribute to the US competition policy.

From the perspective of the EU, the hesitation towards a flexible approach for minimum RPM is more comprehensible in comparison to the US, for it is a supranational organization attempting to align, first and foremost, the economic interests of 28 Member states, whilst maintaining the single market. In this regard, taking cautious steps towards a practice of which pro-competitive effects are allegedly purely theoretical is comprehensible. Nevertheless, precluding the application of the “appreciability” standard inherent in Art. 101(1), hence the *De Minimis* Notice in cases of minimum RPM appears to be overreaching. Consequently, the level of caution could be reconsidered, for it may lead to stagnation with respect to the EU Competition Laws’ ultimate aim as stated by the Commission and in most instances by the Court of Justice, namely, consumer welfare.

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